U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: NOV 14 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, (director) revoked the approval of the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal was rejected by the AAO as untimely filed. The AAO subsequently reopened the case pursuant to 8 C.F.R. § 103.5(a)(5)(ii) for purposes of entering a new decision.[1] The director's decision to revoke the petition will be withdrawn, and the matter will be remanded for further consideration.

The petitioner describes itself as a software development and project management business. It seeks to permanently employ the beneficiary in the United States as a senior software engineer. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).[2]

The petition was approved, but subsequently revoked on September 14, 2012, by the Director, Nebraska Service Center, because the director determined that the petitioner had not established that a *bona fide* job offer existed. The director stated that this conclusion was based on inconsistencies in the record; specifically, the director found that the petitioner had failed to adequately explain why the work address listed on the labor certification did not match the address where the beneficiary had actually been employed by the petitioner. The appeal was rejected by the Administrative Appeals Office (AAO) on March 19, 2013, because the appeal was untimely filed.

On June 28, 2013, the AAO notified the petitioner that the AAO was reopening the case. The AAO again cited the variance between the work address on the labor certification and the address where the beneficiary had been working for the petitioner. The AAO noted the explanation of the discrepancy that was offered by counsel on appeal, but stated that "nowhere on the ETA Form 9089 does it state that the beneficiary will be employed in multiple locations." The AAO afforded the petitioner an opportunity to present additional evidence to establish "that the DOL and U.S. workers were apprised of the fact that the offered employment was to take place at multiple locations."

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[1] The regulation at 8 C.F.R. § 103.5(a)(5)(ii) states:

> Service motion with decision that may be unfavorable to affected party. When a Service officer, on his or her own motion, reopens a Service proceeding or reconsiders a Service decision, and the new decision may be unfavorable to the affected party, the officer shall give the affected party 30 days after service of the motion to submit a brief. The officer may extend the time period for good cause shown. If the affected party does not wish to submit a brief, the affected party may waive the 30-day period.

[2] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

The petitioner responded to this request by submitting copies of advertisements it had placed during the recruitment process in the newspaper, with the Indiana Department of Workforce Development, and on the Careerbuilder.com website. These advertisements all note that the position requires "traveling to various job-sites." Counsel also pointed out that despite the director's and the AAO's assertions that "nowhere on the ETA Form 9089 does it state that the beneficiary will be employed in multiple locations," the labor certification does, in fact, state at Line H.11 that the position requires "traveling to various job sites."

The petitioner's explanation is supported by significant contemporaneous evidence. Upon review of the entire record, including evidence submitted on appeal and in response to the NOR/NOID, the AAO concludes that the petitioner has established that it is more likely than not that a *bona fide* job offer exists between the petitioner and the beneficiary.

However, the record contains other discrepancies that were not detailed in the director's decision. The AAO conducts appellate review on a *de novo* basis. The AAO's de novo authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Specifically, the record reveals that the number of employees listed in employment records submitted by the petitioner and claimed on the petition itself were at variance with information obtained from the United States Citizen and Immigration Services (USCIS) Validation Instrument for Business Enterprises (VIBE) system. The petitioner has submitted extensive tax payroll records pertaining to its employees during the years in question. Counsel for the petitioner asserts that USCIS has, in the past, confused it with another company and had "quoted the wrong FEIN for this petitioner." Counsel for the petitioner also provides the petitioner's Dun & Bradstreet number and claims that it was not registered until 2007 when the instant petition was filed. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). No evidence to demonstrate the petitioner's correct Dun & Bradstreet number or registration date was submitted. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reason discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision.